Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1324

COSDEN OIL AND CHEMICAL COMPANY,
Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 826,
Respondent

ANSWER TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

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ANSWER OF RESPONDENT TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

The Respondent, International Union of Operating Engineers, Local 826, files this Answer to Petitioner's, Cosden Oil and Chemical Company, Petition for Writ of Certiorari and would respectfully pray that said Writ of Certiorari be in all things denied for the following reasons:

OPINION

The opinion of the Texas Court of Civil Appeals, 585 S.W.2d 911 (Tex. Civ. App. 1979) and the order

of the Supreme Court of Texas denying the Petition for Writ of Error, 23 Tex. S. Ct. J. 80 (Nov. 28, 1979) are correct.

JURISDICTION

This Honorable Court does not have jurisdiction of this dispute under 28 U.S.C., Sec. 1257(3) because there is no question involved in this dispute regarding a treaty or statute of the United States; the validity of a State statute is not drawn in question on the grounds of its being repugnant to the Constitution; there is no question in dispute regarding treaties or laws of the United States; there is no title, right, privilege or immunity set up or claimed under the Constitution, treaties or statute of or concession held or authority exercised under the United States.

The question in this case is a suit on breach of contract and enforcement of the contract language by way of specific performance and therefore, the Court has no jurisdiction.

STATEMENT AND NATURE OF THE CASE

The Court of Civil Appeals has correctly stated the nature and result of the case. The Respondent will not restate the facts, however, the Respondent would point out to this Court that the Petitioner breached the collective bargaining agreement and refused to arbitrate Union Grievance No. 78-37 by failing to select from the list of arbitrators submitted by the F.M.C.S. on August 7, 1978.

Respondent's contention is that the Petitioner flagrantly breached the arbitration clause and that his refusal to

arbitrate this grievance was squarely before the Court below, and based upon the evidence, admissions and language of the arbitration agreement, there was no genuine issue of fact, and the Court below was duty bound, as a matter of law, to rule in favor of the Respondent and order specific performance of the collective bargaining agreement pertaining to arbitration.

The Honorable Court of Civil Appeals correctly held that the collective bargaining agreement between the parties provides for arbitration *solely* with regard to labor disputes and the dispute regarding selecting an arbitrator is not a labor dispute. This being true, the Supreme Court of Texas properly denied the Petitioner's Writ of Error.

RESPONDENT'S ANSWER TO PETITIONER'S REASONS FOR GRANTING THE WRIT

The Court of Civil Appeals did not err as contended in Petitioner's Petition for Writ of Certiorari, but correctly decided this appeal in favor of the Respondent.

ARGUMENT AND AUTHORITIES

The Respondent will brief his Answers to Petitioner's Reasons for granting their Writ of Certiorari together.

Respondent wishes to set out the specific article, Art. 8, Sec. 4 of the collective bargaining agreement which is at issue:

> "Should the Industrial Relations Department and the Grievance Committee fail to settle the grievance, the Industrial Relations Department will notify the union fifteen (15) days after the meeting, in writing, of such fact; and within thirty (30) days after receipt thereof, the case may be referred to arbitration by

> a committee consisting of three (3) members, one (1) to be appointed by the company, (referring to the Defendant), one (1) to be appointed by the union, (referring to the Plaintiff), and the third (3) selected by the first two (2). If the two (2) members selected by the company and the union are unable to agree upon the third (3) member within seven (7) days after appointment, the company and the union *shall* jointly request in writing that the Director of Federal Mediation and Conciliation Service designate a panel of five (5) from which the parties *will* select the third (3) arbitrator."

This Court can readily see that the above provision is a mandatory provision requiring the company and the union to select from the first panel designated by the Director of Federal Mediation and Conciliation Service.

The word "shall" as used in statutes, contracts, or the like, is generally meant to mean imperative or mandatory. The word "will" has the mandatory sense of "shall" or "must". See *Black's Law Dictionary, Seventh Edition.*

Petitioner's refusal to strike from the first arbitration list is a refusal to arbitrate. Without an arbitrator there could be no arbitration. As previously stated, a casual reading of Art. 8, Sec. 4 of the contract leaves no other interpretation than the parties must strike from the first panel.

It is undisputed that Grievance 78-37 was an arbitral grievance as it was a discharge case. Therefore, the Court below was called upon to decide if the refusal of the Petitioner to select an arbitrator under the clear language of Art. 8 was a breach of the contract and if so, to enforce the contract.

The arbitration clause regarding the selection of an arbitrator is not susceptible to any other interpretation other than the parties must select from the first panel.

The nature of the union's claim and the meaning of the arbitration clause is evident and any ambiguity is the result of the Petitioner's patently impossible or unreasonable interpretation. Therefore, the Trial Court had to construe the language of the contract as finally agreed upon in accordance with the ordinary rules of construction and find that the refusal to strike from the first panel was a refusal to arbitrate in accordance with the contract.

This Court, as well as the Courts below, is called upon to determine whether or not the Petitioner's refusal to arbitrate under the clear language of the collective bargaining agreement was a breach of the collective bargaining agreement, then the Trial Court below would have had the right to require specific performance of the arbitration clause as it did.

The jurisdiction of the State Court over a suit for violation of the collective labor contract between an employer and a labor union, representing the employees, is not divested by Sec. 301(a) of the Labor-Management Relations Act of 1947, 29 USC Sec. 185(a). *Charles Dowd Box Company v. John F. Courtney,* 368 U.S. 502, 7 L.Ed.2d 483, 82 S.Ct. 519 (1961). This Court has held on numerous occasions that agreements to arbitrate grievance disputes contained in a collective bargaining agreement should be specifically enforced by the Courts in pursuance to the provisions therein. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957); *Goodall-Sanford, Inc. v. United Textile Workers of America,* 353

U.S. 550, 1 L.Ed.2d 1031, 77 S.Ct. 920 (1957); *General Electric Company v. Local 205, United Electrical Radio and Machine Workers of America,* 353 U.S. 547, 1 L.Ed. 2d 1028, 77 S.Ct. 921 (1957).

The contract signed by an employer, such as the Petitioner, and the union provided that the worker's grievance would be handled pursuant to a specific specified procedure. The last step in the procedure was arbitration. But the Petitioner, by refusing to select from the first panel of arbitrators, effectively prevented arbitration and finally denied the union the request to arbitrate under the contract language. The above *Textile Workers* cases, supra have held that Sec. 301 of the Labor-Management Relations Act is more than jurisdiction. It authorizes the Federal Court to fashion a body of Federal Laws for the enforcement of union contracts and includes within that Federal Law specific performance of promises to arbitrate grievances under union contracts.

Plainly, the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the Legislation does more than confer jurisdiction in the Courts over labor organizations. It expresses a policy that Courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way.

In *John Wiley & Son, Inc. v. Livingston,* 376 U.S. 543, 11 L.Ed.2d 894, 84 S.Ct. 909 (1964), this Court has held that whether or not an employer is bound to arbitrate under the provisions of a collective bargaining agreement as well as what issues he must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

The Court of Civil Appeals' Justice Raleigh Brown has correctly held:

"The thrust of Cosden's appeal is that the trial court has erroneously assumed the role of arbitrator in deciding who shall prevail on the merits of the arbitration in Grievance No. 78-45. We disagree."

In support of its position, Cosden cites cases which provide:

> "The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Enterprise Wheel & Car Corp., 363 U.S., at 599, 4 L.Ed.2d 1424, 80 S.Ct. 1358, 46 LRRM, at 2426 . . .
>
> In short, in labor cases to compel arbitration, there are only two issues before the Court: (1) whether an agreement to arbitrate exists; and (2) whether the particular dispute in question is susceptible to arbitration under the agreement. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 564, 583 n. 7 & 585, 46 LRRM 2416, 2420 (1960); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 50 LRRM 2433 (1962). As pointed out above, if there are any doubts as to the susceptibility of the dispute to arbitration, these doubts are to be resolved in favor of arbitration. Warrior & Gulf, supra, 363 U.S. at 582-583, 46 LRRM at 2419-2420.

The Court in *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

Justice Brennan in *United Steelworkers* said:

> To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court

In the instant case, the agreement entered into between the parties provides for arbitration solely with regard to labor disputes. The present dispute between the parties is not a labor dispute.

Appropriate summary judgment rules support the ruling of the trial court. *Gibbs v. General Motors Corporation,* 450 S.W.2d 827 (Tex. 1970); *Great American Reserve Insurance Company v. San Antonio Plumbing Supply Company,* 391 S.W.2d 41 (Tex. 1965); and *Oram v. General American Oil Company of Texas,* 513 S.W.2d 533 (Tex. 1974).

We have considered and overrule all points of error.

The judgment is affirmed."

Petitioner's position has always been that they had the right to refuse to select from the first panel and that

whether or not they did have the right to refuse to select from the first panel was a labor dispute or legitimate dispute which was arbitrable. The Respondent says this is an untenable position and as previously stated, the nature of the union's claim and the meaning of the arbitration clause is evident and any ambiguity is the result of the company's patently impossible, unreasonable interpretation. Therefore, the Court must construe the language of the contract as finally agreed upon in accordance with the ordinary rules of construction and find that the refusal to strike from the first panel is a refusal to arbitrate. In *Communication Workers of America v. Southwestern Bell Telephone Company,* 415 Fed. 2d 35 (5th Cir. 1969) the Court held that arbitration of labor disputes is a matter of contract and not a matter of right. The Courts must decide if the party asking for arbitration is making a claim which on its face, is governed by the contract.

An arbitration clause in the union contract signed by an employer whose business affects interstate commerce can be enforced in the Courts.

The Court cannot compel a party to a collective bargaining agreement to submit to arbitration without a judicial determination that the agreement does in fact create such a duty. *John Wiley & Son,* supra. The interpretation of the arbitration clause remains a judicial function in the typical case. *International Union of Operating Engineers, Local 139 v. Carl Morse, Inc.,* 529 Fed. 2d 574 (7th Cir. 1976).

Simply stated, it is our position that the Petitioner has wholly breached the contract and that the breach of the contract is subject to enforcement by the Courts and is not an arbitrable dispute.

It has always been held that the party claiming that arbitrability is for an arbitrator bears the burden of proof and must show that collective bargaining agreement contains an arbitration clause which clearly manifests such an intention. *Associated Milk Dealers, Inc. v. Milk Dealers Union, Local 753, et al,* 422 Fed. 2d 546 (7th Cir. 1970). Petitioner states that the subsequent filing of the grievance short of arbitration was some kind of a waiver to the suit for specific performance, however, the Petitioner has cited no authority to support this position and we would respectfully point out to this Court that the suit to compel arbitration by specific performance was filed on or about the 8th day of November and that most of the correspondence pertaining to the second grievance happened subject to the suit and no arbitrator has been selected up to the present time in the subsequent grievance.

This dispute involves a clear breach of a contract and not a labor dispute as Petitioner would like this Court to believe.

Petitioner would like this Court to say that there is a labor dispute over their refusal to select from the first panel, but this Court knows that to create a good faith dispute, there must be some foundation. There must be good faith to create a dispute. Otherwise, there exists no bonafide dispute which may be submitted to arbitration and Respondent contends that there is no foundation for the position taken by the Petitioner in their refusal to strike from the first panel furnished in direct violation of the contract language in the arbitration provision and therefore, there could never be an arbitrable dispute because there is no foundation and said position is frivolous.

Therefore, the Trial Court correctly found breach of contract as a matter of law and ordered specific performance of the collective bargaining agreement requiring the Petitioner to strike from the first list of arbitrators submitted and the Honorable Court of Civil Appeals correctly affirmed the Trial Court judgment. The Supreme Court of Texas decision to refuse the Writ of Error was also correct.

CONCLUSION AND PRAYER

For these reasons and based upon the authorities cited, we submit the Court of Civil Appeals correctly sustained the lower Court's judgment and that this Honorable Court should not review the Petitioner's Writ of Certiorari.

Respectfully submitted,

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By: _____
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CERTIFICATION OF SERVICE

This is to certify that three copies of the foregoing Answer to Petitioner's Petition for Writ of Certiorari has been forwarded to the attorney for the Petitioner, Mr. Durwood D. Crawford, 4245 First International Building, Dallas, Texas on this 13th day of March, 1980.

By: _____
JAMES R. EDWARDS

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